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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 FIDELITY & GUARANTY LIFE
12 INSURANCE COMPANY, a Maryland
Insurance Company,

13 Plaintiff,

14 vs.

15 JAMES O. ALBERTSON, an individual,

16 Defendant.

17 JAMES O. ALBERTSON

18 Counter-Claimant

19 vs.

20 OLD MUTUAL FINANCIAL NETWORK
21 F/K/A FIDELITY AND GUARANTY LIFE
INSURANCE CO., MARK HUNTON AND
DOES 1-10,

22 Counter-Defendants
23

CASE NO. 07CV00045 BTM(LSP)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS AND DENYING AS MOOT
MOTION TO STRIKE**

24 Mark Hunton ("Hunton") has filed a motion to dismiss James Albertson's First
25 Amended Counterclaim pursuant to Fed. R. Civ. P. 12(b)(6). Fidelity & Guaranty Life
26 Insurance Company ("F&G") has filed a motion to strike. For the reasons discussed below,
27 Hunton's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**, and F&G's motion
28 to strike is **DENIED AS MOOT**.

I. BACKGROUND

This action arises out of a dispute between Albertson and F&G over life insurance proceeds. Albertson was the named beneficiary on a life insurance policy between F&G and Luis Plascencia ("Plascencia"), who is now deceased. (Albertson also obtained a life insurance policy from F&G and named Plascencia as the beneficiary. Albertson's life insurance policy is not in dispute.) According to F&G, Plascencia made material misrepresentations regarding his medical history and criminal record on his application for the policy. F&G contends that it would not have issued the life insurance policy had Plascencia been truthful on the application. In its Complaint, F&G seeks declaratory relief and rescission of the insurance contract under a two-year contestability clause.

In his First Amended Counterclaim ("FAC"), Albertson alleges, inter alia, that Plascencia was non-fluent in English and was functionally illiterate and, therefore, was incapable of making any material misrepresentations. According to Albertson, Hunton, an agent for F&G as well as an insurance agent for Plascencia and Albertson, fraudulently represented to Albertson that he was fluent in Spanish and could translate the policy application and Plascencia's responses thereto. Albertson alleges that Hunton filled out the application for Plascencia even though he could not speak Spanish and knew that Plascencia did not understand the application, causing a substantial likelihood that the recorded responses would be inaccurate.

The FAC asserts the following causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) negligence per se; and (5) fraud (against Hunton only).

II. DISCUSSION

Hunton moves to dismiss all of Albertson's claims against him for failure to state a claim. F&G moves to strike portions of the negligence per se claim. The Court grants the motion to dismiss as to the breach of contract and breach of the implied covenant of good faith and fair dealing claims against Hunton and the negligence per se claim against Hunton

1 and F&G, but denies the motion as to the negligence and fraud claims. The Court denies
2 F&G's motion to strike as moot in light of the dismissal of the negligence per se claim.

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4 A. Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing

5 Hunton argues that the breach of contract claims fail to state a claim against him
6 because he was not a party to the insurance contract. The Court agrees. According to the
7 FAC, Hunton was an insurance agent. An insurance agent is not a party to an insurance
8 contract and cannot be held liable for breach of contract or breach of the covenant of good
9 faith and fair dealing as a matter of law. Minnesota Mutual Life Ins. Co. v. Ensley, 174 F.3d
10 977, 981 (9th Cir. 1999). Therefore, the Court grants the motion to dismiss the breach of
11 contract and breach of the implied covenant of good faith and fair dealing claims against
12 Hunton.

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14 B. Negligence

15 Hunton moves to dismiss the negligence claim against him on the ground that he
16 cannot be held personally liable for acts he performed as an agent for F&G. Under California
17 law, an agent for an insurance company is not personally liable for acts he performed within
18 the scope of his agency, provided there was full disclosure of the principal. Lippert v. Bailey,
19 241 Cal. App. 2d 376, 382 (1966).

20 However, when a defendant is a dual agent – i.e., an agent for the insurance company
21 and the insured – the defendant may be held liable for breaching the duty of reasonable care
22 owed to the insured. Kurtz, Richards, Wilson & Co, Inc. v. Ins. Communicators Marketing
23 Corp., 12 Cal. App. 4th 1249, 1258 (1993). Where a dual agency is alleged, the existence
24 of a dual agency is a question for the trier of fact. Id.

25 Albertson alleges that Hunton was a dual agent who acted as an agent for F&G as
26 well as Albertson and Plascencia. (FAC, ¶ 18.) Hunton argues that the FAC does not set
27 forth facts establishing that Hunton was a dual agent. However, detailed facts proving dual
28 agency are not required at the pleading stage. By alleging dual agency, Albertson has

1 established a basis for his negligence claim. Therefore, Hunton's motion to dismiss is denied
2 as to the negligence claim.

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4 C. Negligence Per Se

5 Albertson's negligence per se claim is premised on F&G and Hunton's ("Counter-
6 defendants") alleged violations of the Unruh Act, Cal. Civ. Code § 1801, et seq., and Cal. Ins.
7 Code § 10508. Hunton moves to dismiss and F&G moves to strike the negligence per se
8 claim on the ground that there has been no violation of either of these statutes. The Court
9 agrees.

10 Albertson alleges that Counter-defendants failed to deliver to Plascencia a Spanish
11 translation of the contract in violation of Cal. Civ. Code § 1632(b), which applies to contracts
12 subject to the Unruh Act, Cal. Civ. Code § 1801, et seq. The Unruh Act governs retail
13 installment sales. A "retail installment sale" is "the sale of goods or the furnishing of services
14 by a retail seller to a retail buyer for a deferred payment price payable in installments." Cal.
15 Civ. Code § 1802.5. A "retail installment contract" is defined as a contract for a retail
16 installment sale which provides for (1) repayment in installments, subject to a finance charge
17 or other consideration, or (2) payment in more than four installments.

18 An insurance contract is not a "retail installment contract" within the meaning of the
19 Unruh Act if the insured is under no obligation to continue paying premiums and can
20 terminate the policy at any time. Crawford v. Farmers Group, Inc., 160 Cal. App. 3d 1164,
21 1169 (1984). In Crawford, the plaintiff purchased a policy that was priced according to a six-
22 month term. However, the plaintiff was not obligated to make complete payment for the six-
23 month period. As long as she paid the monthly premium and service charge, she was
24 covered for that month. She could terminate the policy without further obligation to
25 defendants by not paying the next month's premium. Therefore, the court reasoned, the
26 insurance company did not extend any credit, and the insurance policy was not covered by
27 the Unruh Act. See also Mackey v. Bristol West Ins. Serv. of California, Inc., 105 Cal. App.
28 4th 1247 (2003) (holding that monthly insurance policy without obligation to pay or purchase

1 beyond that month was not a “retail installment sale”).

2 Here, Plascencia’s premium was calculated on an annual basis. (Policy (Ex. B to
3 Compl.))¹ He was permitted to pay on a semi-annual, quarterly, monthly, or bi-weekly basis.
4 The policy provides that if a premium is not paid within a 31-day grace period after the
5 premium due date, the policy will terminate as of the premium due date. (Policy at 9.) The
6 policy does not require that the entire annual premium be paid or that the premiums be paid
7 throughout the 15-year policy term. Therefore, the insurance policy does not constitute a
8 “retail installment sale” within the meaning of the Unruh Act, and Cal. Civ. Code § 1632(b)
9 is inapplicable.

10 In his opposition to the motion to strike, Albertson cites to cases concerning the
11 applicability of the Unruh *Civil Rights* Act, Cal. Civ. Code § 51, to insurance policies. The
12 Unruh Civil Rights Act is a completely different statute than the Unruh Act (Retail Installment
13 Sales). If Albertson actually intends to make a claim that Counter-defendants violated the
14 Unruh Civil Rights Act by discriminating against Plascencia on the basis of his race, color,
15 or national origin, Albertson may amend the Counterclaim to add such a claim.

16 Albertson also alleges that Counter-defendants violated Cal. Ins. Code §10508 by
17 failing to timely provide the original insurance application. Section 10508 requires every
18 insurer admitted in California to transact life and/or disability insurance to maintain certain
19 records, including the “original application for each insurance policy or contract sold in this
20 state,” for the inspection and examination of the Insurance Commissioner.

21 The FAC alleges that “Mark Hunton lost essentially half of his copies of the life
22 insurance application and F&G only recently disclosed the existence of the alleged original
23 in an untimely manner.” (FAC ¶ 65.c.) However, Hunton, an insurance agent, is not an
24 “insurer” governed by section 10508. As for F&G, Albertson admits that F&G produced the
25 original application. Therefore, F&G maintained the original application as required by
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27 ¹ The policy itself was not attached to the FAC. However, the FAC refers to the policy
28 and Albertson does not challenge the authenticity of the policy attached to the Complaint.
Therefore, the Court can properly consider the policy. Branch v. Tunnell, 14 F.3d 449, 454
(9th Cir. 1994).

1 section 10508. The statute does not require that the insurer produce the records described
2 in the section to the insured or beneficiaries within any specified amount of time.

3 Because Counter-defendants have not violated the Unruh Act, Cal. Civ. Code § 1801,
4 et seq., or Cal. Ins. Code § 10508, the sole bases for Albertson's negligence per se claims,
5 the Court dismisses the negligence per se claim.

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7 **D. Fraud**

8 Hunton seeks dismissal of the fraud claim on the ground that it lacks the specificity
9 required by Fed. R. Civ. P. 9(b). The Court disagrees.

10 Under the heightened pleading standard of Rule 9(b), "[a]llegations of fraud must be
11 accompanied by the who, what, when, where, and how of the misconduct charged." Vess
12 v. Ciba-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003). Albertson has sufficiently
13 complied with these requirements. The FAC alleges that at the time Plascencia and
14 Albertson applied for their respective life insurance policies, Hunton represented to Albertson
15 and Plascencia that he could translate the application to Plascencia. (FAC ¶ 81.) Hunton
16 assured Albertson and Plascencia that the insurance policy would be honored if the premium
17 payments were made. (Id.) However, Hunton knew that he could not speak Spanish and
18 that Plascencia did not know enough English to understand the application, creating a
19 substantial risk that material responses would be inaccurate, resulting in denial of benefits
20 by F&G. (FAC ¶ 81.) Hunton's intentional misrepresentation induced Albertson and
21 Plascencia into allowing Hunton to fill out Plascencia's application without the aid of a
22 translator. (FAC ¶ 88.) Albertson has suffered resulting damage because F&G claims that
23 Plascencia made material misrepresentations in his application and seeks rescission of the
24 contract. These allegations are detailed enough to satisfy the pleading requirements of Rule
25 9(b). Therefore, the Court denies the motion to dismiss as to the fraud claim.

26 Albertson also alleges that during Hunton's deposition, Hunton made the fraudulent
27 statement that Albertson acted as Plascencia's translator during the application process.
28 (FAC ¶¶ 86-87.) Albertson alleges that Hunton lied about Albertson acting as the translator

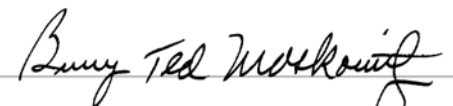
1 because he wanted to induce Albertson to settle with F&G quickly for an amount well under
2 the limits of the policy and wanted to prevent Albertson from joining him as a party to the
3 lawsuit. (FAC ¶¶ 93, 95.) However, Hunton's deposition testimony is probably absolutely
4 privileged under California's litigation privilege, Cal. Civ. Code § 47(b), which applies to all
5 torts other than malicious prosecution. Harris v. King, 60 Cal. App. 4th 1185, 1187-88
6 (1998). Moreover, Albertson cannot claim justifiable reliance or resulting damage, essential
7 elements of a fraud claim, because Albertson did not settle with F&G and filed the FAC
8 against Hunton. See Bank of the West v. Valley Nat. Bank of Arizona, 41 F.3d 471, 477 (9th
9 Cir. 1994). Accordingly, Albertson's fraud claim is limited to Hunton's alleged
10 misrepresentation that he had the ability to act as a translator for Plascencia.

11 12 **III. CONCLUSION**

13 For the reasons discussed above, Hunton's motion to dismiss is **DENIED IN PART**
14 and **GRANTED IN PART**. The breach of contract claim against Hunton, the breach of the
15 implied covenant of good faith and fair dealing claim against Hunton, and the negligence per
16 se claim against Hunton and F&G are **DISMISSED**. In addition, the fraud claim is
17 **DISMISSED** to the extent that it is based on Hunton's deposition testimony. As to all other
18 claims, the motion to dismiss is **DENIED**. F&G's motion to strike the negligence per se claim
19 is **DENIED AS MOOT**. Albertson may file a Second Amended Counterclaim within thirty
20 days of the filing of this order if Albertson wishes to plead a claim under the Unruh Civil
21 Rights Act.

22 **IT IS SO ORDERED.**

23 DATED: November 10, 2008

24 
25 Honorable Barry Ted Moskowitz
26 United States District Judge
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